# Overview of Development of Competition Law in Nigeria

**By:**

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## Introduction

In his contribution to this symposium on Eleanor Fox and Mor Bakhoum's book, Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (OUP, 2019), Jasper Lubeto notes the omission of Nigeria, Africa's largest economy, as a case study in the book. This excellent book went to press before Nigeria's competition law came into force in January this year. To add to the rich discussion in this symposium, this essay discusses the historical development of Nigeria's new competition law as well as the players and forces that shaped it. Finally, it reflects on the challenges and opportunities open to the new agency established to oversee competition law and policy in Nigeria. This essay also precedes two other essays on Nigerian competition law in the next two days.

## Historical Development

The history of the development of competition law in Nigeria has been a long and chequered one lasting over 17 years.[1] Nnamdi Dimgba ably narrated the conception of the idea in 2002 by the Bureau of Public Enterprises (BPE), the agency charged with the development and implementation of the Federal Government's economic reform agenda. He, however, conveniently forgot to mention the role he played as consultant[2] to Legal Advisory Partnership (LAP) the advisers to BPE who reviewed the ECU Associates draft Federal Competition Commission (FCC) Bill following its rejection by the National Assembly. The rebuff was because the draft sought to expand government bureaucracy by creating a new institution and concerns about fair hearing. LAP was instructed January 18th 2007 and submitted its report as required by the end of March 2007.[3] It made two substantive changes to the FCC Bill and many less substantive changes and produced a new draft Federal Competition and Consumer Protection Commission (FCCPC) Bill.[4] The innovations were the merger of the FCC with the existing Consumer Protection Council[5] to create a new Federal Competition and Consumer Protection Commission (FCCPC) and the Federal Competition and Consumer Protection Tribunal (FCCPT).[6] The merger of the new agency with the existing CPC and creation of the Tribunal were designed to satisfy the above concerns of the National Assembly.[7] After many years of rigmarole in the National Assembly, the revised bill was passed in 2018 substantially as changed by LAP.

## The Federal Competition and Consumer Protection Act (FCCPA) 2019

On January 30th, 2019, the President, General Muhammadu Buhari, GCFR signed the Federal Competition and Consumer Protection Act (FCCPA) 2019 (the Act) which repealed the Consumer Protection Council Act. The FCCPA brought about a unified and codified set of rules that regulate competition law in Nigeria for the first time. Before the enactment, the laws governing competition and consumer protection were separate, fragmented and industry-specific.[8] Before the FCCPA, mergers and acquisitions in Nigeria were mainly regulated by the Investments and Securities Act, 2007 ("ISA") with the Securities and Exchange Commission ("SEC") having general regulatory oversight. The FCCPA has now repealed individual sections of the ISA dealing with mergers and acquisitions. The supervisory control for mergers and acquisitions in Nigeria is now vested in the FCCPC and not the SEC. The FCCPC acts as the competition

regulator empowered to prevent and punish anti-competitive practices, regulate mergers, takeovers and acquisitions, and protect regulated industries in every sector and location in Nigeria. It also performs consumer protection functions. The FCCPA created the FCCPT as the Tribunal to deal with disputes and concerns which may arise from the operation of the law. An aggrieved party can apply for a review of the decision of the FCCPC to the FCCPT and, where that of the Tribunal, appeal to the Court of Appeal.

**First Steps**

The existing CPC structure and personnel have been subsumed in the FCCPC with its Director-General now playing that role in the FCCPC. SEC's role in mergers is now in the exercise of its primary function as the regulator of the capital market. The limited regulatory purview of SEC is considering the fairness among shareholders in mergers and acquisitions by or involving public companies. It is important to note that the FCCPC and SEC recently issued a Joint Advisory Notice[9] to the effect that both organizations would jointly review all notifications of mergers and other business combinations until further Notice. The highlights of the Notice are as follows: (1) SEC regulations, guidelines and fees which were in existence before the enactment of the FCCPA would continue to apply to all pending/subsequent merger transactions until further notice; (2) all new notifications for mergers and requests for approval of mergers are to be filed at the FCCPC's office in Abuja or at the SEC/FCCPA Interim Joint Merger Review Desk in Abuja or Lagos; and (3) all applicable fees are to be paid to the FCCPC. The import of this Notice is that both bodies would collectively review all notifications and filings while the FCCPC would be responsible for conveying the decision of such reviews to the combining entities. This also connotes that regardless of the enactment of the FCCPA, SEC's rules and regulations on mergers and other business combinations remains in force until the FCCPC issues a notice to the contrary.

**Other Players?**

The Corporate Affairs Commission ("CAC"),[10] also plays a part concerning corporations that intend to merge.  It is the responsibility of the CAC to receive corporate filings and to certify corporate resolutions and de-registration of any dissolved company that may occur in the merger process. The Nigerian Stock

Exchange (NSE) is a self-regulatory body that runs the stock exchange for trading in shares. Quoted companies need to meet the listing rules on merger transactions.  Besides, a listed company may be delisted as a result of a merger. The Federal High Court ("FHC") by s.251 of the 1999 Constitution the court is empowered to handle matters concerning companies' operation, management and regulation.  Under the old law, it approves shareholders' meetings and sanctions the merger scheme. With the repeal of portions of the ISA dealing with mergers under the FCCPA, it remains to be seen how the role of the FHC would evolve in merger control.

**Conclusion**

Enactment of the law was a good start, but there are challenges. The way the FCCPC can balance the tension between pure competition issues as against consumer protection or public interest issues will very well determine its future success. There is a concern that given the bias of its start-off staff for consumer protection regulation, the pendulum would shift to public interest rather than fair competition consideration. Closely following is the challenge of lack of capacity in competition regulation in terms of personnel and corporate experience. This challenge if not adequately tackled may lead to regulatory gap and ineffectiveness of the new regime.

Daniel Sokol argues that the pragmatic approach of many young antitrust agencies is to focus on the "low hanging fruit" of antitrust regulation.[11]  He asserts that effective results are more comfortable to achieve, and once an agency gains enough expertise and experience in the low hanging area, it can add others.[12] Low hanging fruits would vary from agency to agency and country to country. FCCPC has acquired SEC's institutional knowledge in merger control. It could, therefore, begin with this area as it dives into the regulation of competition, as distinct from consumer protection. Another area would be fundamental competition law advocacy.[13] With an improvement in FCCPC's capacity in merger review and knowledge of necessary competition regulation, it may deal with enforcement actions against monopolies (and regulated industries) and anti-competitive agreements and practices. Besides the recruitment of those with expertise in economics, law and related disciplines with specialization in competition law, the FCCPC should utilize the skill and

support of outside consultants procured using World Bank standard procedure. Getting it right may require consistent funding support of the Federal government through appropriations by National Assembly and international organizations through grants and development loans. Those funding options should be aggressively courted.

Regulatory reform which is nothing but the enactment or transplantation of legislation from a foreign jurisdiction is not likely to be effective. From the analysis of the legislative history of the FCCPA, the process allowed for adjustment of the bill to accommodate the local concerns of the National Assembly and the executive. Perhaps, but for those adjustments, the bill would not have passed and if enacted may not have become operational.[14] However, mere enactment may not be enough for a law to achieve effectiveness. Rigorous implementation and continuous engagement in persuasion and advocacy for the underlying norm behind the law by the norm entrepreneurs and norm leaders to ensure norm internalization by the target norm followers is how the law shall have effectiveness.[15] In the case of the FCCPA, the underpinning norms of encouraging competition and reducing restraints on trade as a means of lowering prices for consumers on the one hand, and protecting the public interest, on the other hand, remain in constant tension. The regulator is, therefore, critical to regulatory success.

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[1] Nnamdi Dimgba, *The Changing Landscape: Federal Competition and Consumer Protection Act* (Four Points by Sheraton Oniru Victoria Island Lagos, 2019).

[2] Perhaps due to his humility

[3] Anthony I Idigbe & Nnamdi Dimgba, *Report to Bureau of Public Enterprises (BPE) on review of the Federal Competition Commission Bill* (Abuja: Legal Advisory Partnership, 2007) Please note that the report is confidential and has not yet been released to the public. The partners in LAP were Nnenna Ejeckam, J K Gadzama SAN, Anthony Idigbe SAN, Dr Babajide Ajibade SAN, Stella

Amachree and Chibuzo Ekwekwuo.

[4] *Ibid*.

[5] Consumer Protection Council Act C25, Laws of the Federation of Nigeria, 2004

[6] Idigbe & Dimgba, *supra* note 3.

[7] *Ibid*.

[8] Dimgba, *supra* note 1.

[9] Joint Advisory and Guidance on Mergers, Acquisitions & Other Business Combinations Notifications

[10] established by the Companies and Allied Matters Act 1990 (“CAMA”) CAP C20 LFN 2004

[11] Daniel D Sokol, “Limiting Anticompetitive Government Interventions that Benefit Special Interests” (2009) 17 Geo Mason Rev 119 at 144.

[12] Sokol, *supra* note 11.

[13] *Ibid*.

[14] Equipment and Leasing Act 2015 set up Equipment Leasing Registration Authority and required registration of all leases though it is not operational because the Federal Government was unwilling to set up another agency that would further bloat its bureaucracy

[15] Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 Int Organ 887.

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